Supreme Court, U.S.
FILED
JUL 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1950

In The

Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and CHARLES J. BRANTLEY, DIRECTOR, DIVISION OF MOTOR VEHICLES,

Petitioners,

v.

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS SIMS AND FICA IN OPPOSITION

ROBERT P. SMITH, JR.
Counsel of Record

CECELIA C. SMITH
123 S. Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pgs.

QUESTIONS PRESENTED:

I. The Eleventh Amendment question, on which this brief does not oppose review, is better stated in Respondents' Cross-Petition in No. 89-19, Question I, or it may be divided thus:

A. Does the Eleventh Amendment immunize a State from suit by its own citizens in Federal Court seeking only declaratory and injunctive relief against a statute violating on its face an express prohibition by Congress, "No state shall . . . "?

B. If a State's defense as "sovereign" is avoidable by suing a party surrogate, shall the State be deemed to have waived that defense, asserted for the first time on appeal, by objecting below to the joinder of a party surrogate, its Attorney General, and securing his dismissal from the case?

C. May a Court of Appeals, having induced the Attorney General as counsel for a State agency to assert that defense for the first time on its own appeal, remedy same by joining as party surrogate an officer of that agency?

II. When Congress has expressly preempted State regulation, is that preemption vitiated by the State's claimed purpose to be enforcing what it considers to be federal law?

III. When claimants are injured in fact by preempted State regulation, do they lack standing to sue if similar injury might have occurred under authentic Federal regulation?

IV. Must a preempted State statute be divided and some part saved when it does not appear the State would have enacted it, and preempting the whole avoids other constitutional issues?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT OPPOSING THE WRIT 9

II. Opposing the Writ on Question II, "The Clean Air Act does not preempt the State's traditional regulation of the highways." 10

III. Opposing the Writ on Question III, Asserted EPA restrictions as dissolving Respondents' Standing 13

IV. Opposing the Writ on Question IV, Whether Florida's role as Safety Act enforcer must be saved 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) 16

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824) 10, 11

Motor and Equip. Mfrs. Ass'n, Inc. v. Envtl. Protection Agency, 627 F.2d 1095 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980) 5

Sims v. Dept. of Highway Safety & Motor Vehicles, U.S. D.C.N.D. Fla. (Final Judgment rendered Dec. 30, 1985) (unreported, but contained in Petitioners' App D1, A219-35) 7, 8, 16

Sims v. Dept. of Highway Safety & Motor Vehicles, 832 F.2d 1558 (11th Cir. 1987), reh'g granted, 840 F.2d 778 (1988) (panel decision) 9, 14, 15, 16

Sims v. Dept. of Highway Safety & Motor Vehicles, 862 F.2d. 1449 (11th Cir. 1989) (in banc decision) 3, 15, 16

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) 15

STATUTES:

Fla. Stat. § 320.02(9) (1985), (1987) recodified as § 320.02(10) (1988 Supp.) ..... *passim*

42 U.S.C. § 7543(a) 1, 5, 10

42 U.S.C. § 7543(b) 5

42 U.S.C. §§ 1983, 1988 10

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGULATIONS AND OFFICIAL AGENCY STATEMENTS:

19 C.F.R. § 12.73(b)(5)(x) (1985) 2

19 C.F.R. § 12.80(b)(1)(iii) (1985) 2

40 C.F.R. § 85.1507 (1985) (1987) (EPA rules 1985-1988) 4, 5, 16

40 C.F.R. § 85.1501-.1515 (1988) (EPA rules eff. 1988) 6

48 Fed. Reg. 16,486 (Apr. 18, 1983) EPA statement of exemption policy 2

52 Fed. Reg. 36,136 (Sept. 25, 1987) EPA statement of new rules codified 40 C.F.R. 2

STATUTES INVOLVED

The Clean Air Act, 42 USC § 7543(a), provides:

> No state . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles . . . subject to [the Clean Air Act]. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle . . . .

Florida Statute § 320.02(9), Fla. Stat. (1985), (1987), recodified as § 320.02(10) (1988 Supp.), provides:

> 320.02 Registration required; application for registration; forms. –
>
> . . .
>
> (9) Before a motor vehicle which has not been manufactured in accordance with the federal Clean Air Act and the federal Motor Vehicle Safety Act can be sold to a consumer and titled and registered in this state, the motor vehicle must be certified by the United States Customs Service or the United States Department of Transportation and the United States Environmental Protection Agency to be in compliance with these federal standards. . . .

STATEMENT OF THE CASE

This Statement is made necessary by the inaccurate characterizations throughout the Petition of federal laws and regulations that Florida by its statute would arrogate to its own superintendence.

During the year 1985 when Sims and FICA sought and won relief in the U.S. district court, some 68,000

vehicles like Sims's old Mercedes-Benz, built to German standards and initially marketed abroad, were granted entry to the United States under joint regulation by Customs, the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA).[1] Customs released those cars to importers under the usual form of bond, with added undertakings to conform the engine to EPA emission standards by adding a catalytic converter, burning only unleaded gasoline; and to install U.S.-approved headlights, seatbelt anchors, door beams, etc., as required by NHTSA in the Federal Motor Vehicle Safety Standards (FMVSS). 19 C.F.R. § 12.73(b)(5)(x); § 12.80(b)(1)(iii) (1985).

Thirty thousand imports in 1985, nearly half the total that year, were exempted from EPA compliance by the agency's "Five Year Personal Use Provision" allowing a "first-time individual importer," among them Respondent Sims, to import an older car for personal use without modification.[2] "A reduction in paperwork burden" was

---

[1] EPA referred in 1987 to "the vastly increased volumes of nonconforming vehicles imported annually (from 1500 in 1980 to about 68,000 in 1985)." So speaking while this case was before the Eleventh Circuit, EPA promulgated an entirely new set of rules effective July 1, 1988: "Air Pollution Control; Importation of Nonconforming Motor Vehicles and Motor Vehicle Engines," 52 Fed. Reg. 36,136, 36,139 (Sept. 25, 1987), codified at 40 C.F.R. § 85.1501-.1515 (1988).

[2] In 1983 EPA recorded in *Federal Register* its policy since 1981 "exercis[ing] its enforcement discretion by not taking enforcement action . . . against an individual importing a vehicle at least five model years old, who has not imported a nonconforming vehicle since the effective date of the Clean Air Act of 1970. . . ." "Notice of Revised Administrative Procedures and Enforcement Policy," 48 Fed. Reg. 16,486 (Apr. 18, 1983).

an EPA goal in that policy, 48 Fed. Reg. 16,486 (1983), and EPA achieved it in 1985, the year when imports soared on new highs of Dollar purchasing power abroad. EPA simply checked the importer's name against a list of those who had already imported such a car, and exempted those who had not.[3] The compliance proofs sent to EPA were thus limited to those of new cars entering commercial markets. EPA was able to issue approvals even for nonexempt cars within three to six weeks (R4-42-88).

In May 1985 Respondent Sims bought and imported an older model Mercedes qualifying for her one-time EPA exemption. Automatically, EPA issued its exemption letter releasing EPA's interest in her bond. Ct. App. in banc op., 862 F.2d text at fn. 5, A15. Sims had her Safety Act devices installed at once, and mailed the proofs to NHTSA. Florida meanwhile refused Sims and others like her a tag and title.

NHTSA had no exemption policy, so had to deal with compliance proofs for all 68,000 imports that year. By mid-1985 NHTSA had a backlog of more than 14,000 sets of photographs and papers from conversion shops nationwide, proving safety devices newly installed in individual cars. Dist. Ct. Op., A222. NHTSA required three to four months, even up to a year, to examine all the paperwork and issue a form letter releasing NHTSA's interest in the importer's bond.

---

[3] *Id.* at 16,487: "[A]ny individual who imports a vehicle that would qualify must . . . post a bond with Customs at the time of entry. . . . EPA will then determine if this policy applies to that individual and, if so, will ask Customs to release the EPA obligation on the bond."

The delay by NHTSA for several months was unimportant in NHTSA's regulatory scheme to any importer who had no wish to sell his or her car. (Indeed EPA already forbade its exempted importers from selling within two years, Ct. App. in banc op., 862 F.2d at 1453 fn. 5, A15). Neither the Safety Act nor NHTSA placed any restriction on tagging, titling and operating a car from the moment of importation – not even before the safety devices were installed, and the proofs sent to NHTSA. Ct. App. panel op., 832 F.2d text at 1563, fn. 7 at 1564, quoting D.O.T. statement to Congress (A122-23).

EPA's rule on the other hand prohibited driving before the car "has been granted final admission." 40 C.F.R. § 85.1507 (1985), (1987):

> A motor vehicle . . . conditionally admitted . . . shall be stored and shall not be operated on the public highways or sold until such vehicle . . . has been granted final admission. . . .

This "final admission" event became the focus of Florida's pose as enforcer of federal law and EPA policy. So far as EPA was concerned, its exemption of such cars as Sims's, or its approval of compliance by nonexempted cars, ended EPA's inquiry. That was its "final admission" ending EPA's § 85.1507 prohibition of driving. Both the agency's exemption letter and its modification-approval letter assume the car will then be registered anywhere but California, the only state not preempted by § 7543(a).[4]

---

[4] PX 8B EPA's modification approval letter adds a "NOTE TO IMPORTER: This is an important document. Please keep a copy with the vehicle *registration* at all times" (e.a.). PX 8A

(Continued on following page)

But Florida, acting as if it were a territorial surrogate, interpreter and enforcer of federal law, denied these import cars tags and titles (refused only those, and granted any domestic smoking wreck a tag, title, and welcome to the highway, R4-42-18) saying EPA's "final admission" doesn't happen until NHTSA too, months later, writes a bond release letter. [The Department migrated far from its statutory text, confusing its own minions and the public, in search for *some* federal paper approximating "must be certified . . . to be in compliance with these federal standards," Fla. Stat. § 320.02(9).]

Florida declared as EPA policy, in other words, that after EPA exempted some 30,000 imports from emission standard compliance in 1985, and approved compliance by 38,000 more, EPA yet insisted that all 68,000 remain "stored" and not operated, 40 C.F.R. § 85.1507 (1985), until another agency that never prohibited driving at all took some distant action in its own regulatory realm.

Florida produced no evidence of this at trial, only hand-wringing lawyers who spoke ominously of federal violations as does their Petition, *passim*. Florida had no evidence that EPA enforced or intended to enforce any

---

(Continued from previous page)

EPA's exemption letter advises, "We have been informed by the California Air Resources Board that a used vehicle . . . may not be *registered in California* unless it is first brought into conformity with California or Federal emission requirements" (e.a.). California alone, whose regulation predates the 1966 Clean Air Act, is excused by 42 USC § 7543(b) from preemption by § 7543(a). *Motor and Equip. Mfrs. Ass'n, Inc. v. Envtl. Protection Agency*, 627 F.2d 1095, 1101 fn. 1 (D.C. Cir. 1979).

such absurdity, and could not suggest why, if that *were* EPA policy, tens of thousands of owners like Sims across the Nation, their cars locked in garages awaiting inconsequential NHTSA paper, remained quiet and servile throughout the year, unknown to Congress, EPA and the public world.

The expert and anecdotal testimony in the district court trial was uncontradicted: EPA's § 85.1507 reference to "final admission" referred to its *own* act of approving catalytic converter proofs or declaring an equivalent exemption. EPA later gave further evidence of this in 1987 rulemaking, repeatedly using the term "final admission" in reference to EPA's own actions, none other.[5]

The U.S. district court wisely found it unnecessary to declare what was consistent and inconsistent with federal law in Florida's unauthorized pose as EPA's interpreter-enforcer. Rather the court held the Florida statute was expressly preempted by the Clean Air Act, preempted as well by the Safety Act's bestowal of enforcement powers

---

[5] References in the 1987 rule to "final admission" include § 85.1502(8) *defining* a nonconforming car as one not "finally admitted into the United States under the provisions of" EPA's *own* rules; § 85.1503 granting or denying "final admission" *solely* in terms of conformity with EPA's *own* standards; § 85.1504(a) which conditions "final admission" exclusively on adequate report to "the [EPA] Administrator"; § 85.1505(a) which provides a car "may be finally admitted into the United States upon approval of the certificate holder's application *to the [EPA] Administrator*" (e.a.); § 85.1505(b) and (c) stating when "EPA approval for final admission . . . shall be presumed not to have been granted" and when "EPA approval for final admission . . . shall be presumed to have been granted"; and so on.

exclusively on NHTSA, and a plain violation of the dormant Commerce Clause as well, a rare unambiguous attempt by a State to regulate a sector of Foreign Commerce, Foreign Commerce *as such*, flowing through its ports. Dist.Ct. Op. App.D1, A227-28, as to the Clean Air Act (emphasis by the court):

> The state argues . . . that the challenged statute simply "insures that new cars coming on to Florida's highways comply with the Clean Air Act." . . . The state fails to recognize, however, that it is not its role to enforce such standards at the stage it seeks to do so. It does not matter if the state has enacted standards that are different or identical to those enacted by the federal government at this point. The intent of Congress is very clear and specific: Prior to the first sale [after importation], the states are preempted from enacting *any* regulatory or enforcement scheme either of their own *or to complement the federal scheme*, with specific regard to titling and registration. . . . Enforcement of the Clean Air Act before first sale is the sole and exclusive prerogative of the federal government. . . .

As to the Safety Act, *Id.* at A229, 235:

> The state argues again that it . . . is in fact merely requiring that the federal standards be met before a vehicle is allowed onto the state's highways.
>
> . . .
>
> This court is not swayed by such concern for the enforcement of federal law in this area. If one thing has become clear during the resolution of this case, it is that there is nothing in federal law to prohibit states from enacting enforcement schemes of their own to enforce the provisions of the Clean Air Act and the Motor Vehicle Safety Act *following the first sale of the vehicle*. . . . Indeed, Florida formerly had an automobile inspection program to do just that. . . .

As to the Commerce Clause, *Id.* at A236, A237-38:

> Even were the challenged Florida statute not preempted by federal law, it would have to fail as it is a burden on foreign commerce as prohibited by the Constitution under Article I, section 8, clause 3.
>
> . . .
>
> . . . The statute prevents the titling and registration of vehicles which in turn limits the marketability of the cars. To force an importer to use a different port of entry, for example Savannah, Georgia, or Mobile, Alabama, in order to receive registration and titles from the relevant state authorities without having to endure the trials and tribulations that Florida has erected in their path destroys the common market of commerce for the entire United States as established by the Constitution. It is precisely this type of state action that the Commerce Clause was designed to prevent; thus the statute is constitutionally infirm. As the state has presented no evidence that this law is necessary to serve some special local consideration, it cannot survive scrutiny under this section of the Constitution.

The Court of Appeals deliberating the Department's appeal raised new questions of mootness, standing and Eleventh Amendment – inciting the Eleventh Amendment plea by the Department which is the subject of Question I in this Petition, and Question I in Respondents' Cross-Petition, No. 89-19. The panel held on the merits, one judge dissenting, that Florida Statute § 320.02(9) was expressly preempted by the Clean Air Act, though *not* by the Safety Act,[6] but in any event was

---

[6] The panel Safety Act holding was that Florida "imposes [no] additional requirements or burdens" not imposed by the

(Continued on following page)

entirely invalid for violation of the dormant Commerce Clause. *Sims v. Dept. of Highway Safety & Motor Vehicles*, 832 F.2d 1558 (11th Cir. 1987).

The Court of Appeals in banc held Florida was expressly preempted by the Clean Air Act but not by the Safety Act, and found it unnecessary to rule on the dormant Commerce Clause question.

ARGUMENT OPPOSING THE WRIT

Respondents do not oppose the Writ on Question I, the Eleventh Amendment. Their Cross-Petition in No. 89-19 urges the Court to take and decide that Question (more accurately stated in terms of the case), and to decide as well whether Sims and FICA will then have finally prevailed on a claim of right, privilege or immunity secured to them by the Clean Air Act, requiring a fee

---

(Continued from previous page)

Safety Act, 832 F.2d at 1566, 1567. This unfortunate misconception is traceable within the panel opinions to the dissenter's extensive reliance upon an incompetent private document – "Automobile Importers Compliance Ass'n, *Handbook of Vehicle Importation*" – which lay in the record after the Department marked it for identification at trial but was unable to authenticate it as evidence. The district court excluded the monograph as unauthenticated hearsay after the identifying witness said the document was *wrong* in precisely the respects relied on by the dissenting judge, 832 F.2d at 1576 lt. col., saying the "final admission" referenced by EPA's rule "occurs after Customs receives bond release letters from the EPA and NHTSA and the duty is liquidated." After we called the error to the Court's attention, the illegitimate theory was for the most part excised from the in banc opinions.

award under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. Uniquely, the Clean Air Act not only preempts state motor emissions regulation to a certain point ("No state shall . . . ") but also grants a particular right or privilege to importers, or perhaps an immunity, which flows in consequence of that preemption: Congressionally-secured tags and titles notwithstanding any state's law, or views on federal law, relating to the control of emissions. 42 U.S.C. § 7543(a):

> No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle as condition precedent to the . . . titling . . . or registration of such motor vehicle. . . .

The right, privilege or immunity thereby secured in the importer, as Chief Justice Marshall once said, "convey[ed] the right to which the privilege [of importation] is attached, and in the exercise of which its whole value consists." *Gibbons v. Ogden, infra.*

II. Opposing the Writ on Question II, "The Clean Air Act does not preempt the State's traditional regulation of the highways."

Considering how Florida discriminates by § 320.02(9) discretely against a small sector of Foreign Commerce, as such, and freely tags, titles and opens its highways to any other car regardless of condition, this question is hardly pertinent.

The Petition asserts (p. 35) that Florida's statute "does not create or enforce air emission standards," nor, presumably, safety standards. Florida proposes rather that "traditional regulation of the highways" includes its

authoritative interpretation and enforcement of laws enacted by Congress regulating Commerce with Foreign Nations. "Any vehicle not in compliance and inside the customs territory of the United States is here illegally," Florida says Petition p. 38, also pp. 31, 37, 39, 42. Florida therefore is not preempted by the express language of the Clean Air Act: "No state shall . . . "

Florida confuses its power as a state with regard to safety and emissions in cars on its highways – a power Florida chooses not to exercise – with the power Congress has as regards some of those cars because to a point specified by Congress they are instruments of Foreign Commerce that Congress has chosen to protect under its own exclusive regulation.

The only possible reason to grant the Writ on such a Question as the State poses would be to seize a rare opportunity to reaffirm the federalist principles that enlivened Chief Justice Marshall's opinion for the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

With clarity rarely achieved (or needed) since, Marshall distinguished in "terms and nature" Florida's power from that of Congress and its agents such as EPA. 22 U.S. at 197:

> The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition [by New York] now under consideration applies . . .

At 199, 200:

> . . . In imposing taxes for state purposes, they [the states] are not doing what Congress is empowered to do. . . . When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations . . . it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. . . .

The matter in issue was (every law student learns) New York's asserted power upon its waterways to supervise, to permit or deter, boats employed by Gibbons "in carrying on the coasting trade, under the act of Congress." 22 U.S. at 2. The analogy to the present case could not be more clearly stated than by Chief Justice Marshall, 22 U.S. at 212-13:

> It will at once occur, that, when a legislature [Congress] attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the right must imply a power to exercise the right. The privileges are gone, if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say . . . that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey [or, Sims and FICA would add, from Germany], to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress; *but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state.* . . .
>
> This section [of the Act of Congress] seems to the court to contain a positive enactment, that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. Those privileges cannot be separated from the trade, and

> cannot be enjoyed, unless the trade may be prosecuted. *The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which the whole value consists.* (Emph. added.)

The only significant differences between New York there and Florida, here, are that Florida claims not to deter this Commerce on its own authority, but on the very authority of the United States; and whereas New York offended only the dormant Commerce Clause, Florida in order to "shut her up in her own port" refuses importers the very license that Congress prohibits the states to refuse. In every proper sense, then, "the privilege" of importing goods in Foreign Commerce, granted Sims and others by the United States, "is an idle, empty form, conveying nothing," for want of "the right to which the privilege is attached, and in the exercise of which the whole value consists."

III. Opposing the Writ on Question III, Asserted EPA restrictions as dissolving Respondents' Standing.

This Question is the same as Question II, garbed in other doctrine:

Very well, the argument goes, the Constitution forbids Florida to deny tags and titles to cars imported under auspices of a preemptive Act of Congress and the supervision of federal regulators; but the complaint of Sims and FICA does not describe an Article III "case or controversy" because, until EPA's prohibition of driving is lifted by NHTSA's bond release letter, the real cause of plaintiffs' problem is not Florida's meddling but EPA's prohibition.

Respondents' "standing" was questioned in these terms for the first time by the Court of Appeals panel four months after oral argument. The Clerk's letter dated February 18, 1987 (raising "mootness" and Eleventh Amendment, as well) stated in relevant part:

> The court requests supplemental briefing on the following issues: (1) what are appellees' obligations under the Clean Air Act and . . . Safety Act . . . ; (2) do either, or both, of these statutes or the regulations preclude an importer of a gray market automobile from titling, registering, or driving that automobile in Florida prior to receipt of notice of compliance with such laws from the United States Environmental Protection Agency, the United States Department of Transportation, and the United States Customs Service; (3) if the answer to (2) is yes, what injury, in an article III standing sense, could appellees have sustained as a result of Florida's refusal to title and register gray market automobiles prior to the issuance of the above notices of compliance . . . ?

Though the panel majority eventually found Respondents had standing, its disposition of the issue was affected by a most unfortunate disregard for the uncontradicted evidence at trial. (Perhaps the court felt it was not bound by the evidence and the usual presumptions, since the "standing" issue it raised on appeal wasn't called that below.) More unfortunate still, the panel's "standing" discussion was dominated by reliance on an incompetent third-party hearsay document someone found in the record but not in evidence. The district judge excluded it from evidence after the State's identifying witness said the document was in error on the only point that mattered: EPA's "final admission" did *not*, as the paper said, depend on NHTSA's bond release letter (R4-42-128, 133). Details *supra* p. 8 fn. 6.

The panel's discredited "standing" analysis was abandoned by the court in banc, as Petitioner acknowledges, Petition p. 49 fn. 11, and placed on another ground entirely. The "standing" issue posed by Petitioners as Question III was not, therefore, addressed by the Court of Appeals in banc.

Its factual flaws aside, "standing" as conceived by Petitioners would nullify the right of United States citizens to insist that the United States government, rather than a hostile State, exercise the powers of the United States. The theory suggested is that it does not matter if Florida arrogates EPA's power to itself, EPA would have exercised that power the same way (if, EPA being absent, Florida can so persuade some federal judges). Therefore no injury was caused plaintiffs by Florida, and there is no "case or controversy."

That reasoning would disown the federal judiciary of jurisdiction in any case where a state's persuasiveness was equal to its effrontery posing as local arbiter of federal law and policy. "In effect," Justice Brennan said in circumstances far less threatening to federalism, plaintiffs "will not be permitted to prove what they have alleged . . . because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit." *Warth v. Seldin*, 422 U.S. 490, 523, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (dissenting op.).

Question III is unworthy of review because its factual premise is false, because it was not addressed by the in banc Eleventh Circuit, and because it is neither colorable nor important as a matter of law.

IV. Opposing the Writ on Question IV, Whether Florida's role as Safety Act enforcer must be saved.

While we cannot conceive how this Florida statute can survive Foreign Commerce Clause scrutiny, and both the district court (A236-38) and the Eleventh Circuit panel (832 F.2d at 1568-69, A143-48) agreed it does not, the in banc court avoided that decision, 862 F.2d at 1458, fn. 13, by declaring § 320.02(9) entirely invalidated by the Clean Air Act.

There is a certain propriety in this. There is no reason to think the Florida Legislature would have enacted the statute had it not thought EPA's prohibition of driving pending "final admission", 40 C.F.R. § 85.1507 (1985), an opportunity for State enforcement. NHTSA and the Safety Act didn't offer that inducement, indeed didn't restrict driving at all. What then remains of Florida Statute § 320.02(9) for Florida to enforce, with its reliance on purported EPA restrictions now preempted?

The Eleventh Circuit majority plainly felt it prudent to declare the whole statute invalid and remit the question to the Florida Legislature, rather than to assume unnecessarily that that body would wish its statute to stand, shorn of pretense of enforcing an EPA prohibition. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, 56 S.Ct. 855, 80 L.Ed 1160 (1936). The Court also avoided a direct construction of the dormant Foreign Commerce Clause by placing its decision on grounds of the express preemption by Congress.

Question IV is not worthy of review.

CONCLUSION

The Writ should be denied on Questions II, III and IV. They are distracting, not substantial. Should the Court grant review on Question I, and on Questions I and II of the Cross-Petition, the Court will have every opportunity to speak as necessary to the principles of federalism that control Questions II, III and IV as presented by Petitioners.

Respectfully submitted

ROBERT P. SMITH, JR.
Counsel of Record

CECELIA C. SMITH
123 South Calhoun Street
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

For Respondents

July 31, 1989